IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE, CIVIL JURISDICTION

LETTERS PATENT APPEAL NO.305 OF 1999

Shri O.J.Coelho)
35, St.Andrews Road No.9)
Bandra (West), Mumbai-400 050)..Appellant
(Org.Petitioner)

Versus

1) M/s. FGP Limited)
L.B.S.Marg, Thane-400 604)

2) Mr.K.V.Gopal Krishnan)
President, M/s.FGP Limited)
L.B.S.Marg, Thane.)

3) A.L.Alaspurkar)
Member, Industrial Court)
Thane.)..Respondents
(Org.Respondents)

Smt.V.V.Thorat for the appellant.

Shri P.K.Rele i/by S/shri P.N.Anaokar and Piyush Shah for Respondent No.1.

Coram : S.B.Mhase &
R.S.Mohite,JJ

Date : 15.9.2004 and
16.9.2004.

Oral Judgment :- (Per : R.S.Mohite,J)

1. This is an appeal filed by the appellant (here-in-after referred to as a complainant) who was the employee, against the respondents of whom respondent no.1 was his erstwhile employer. The appeal impugns an order passed by a single Judge of this Court on 21.4.1998, summarily dismissing Writ

petition No.5800 of 1997 at the stage of admission and by which order the learned single Judge has held that the Industrial court Thane has rightly dismissed the complaint filed by the complainant.

2. The brief facts of the case as can be gathered from the record are as follows :-

(a) that by an appointment order dated 15.2.1971 the complainant was appointed by respondent no.1-company as an "Accounts Assistant". The appointment order provided that his services could be terminated by either side by giving 1 month’s notice in writing.

(b) By a letter issued by respondent no.1 company dated 20.6.1984 the complainant was informed that he was promoted to "O" grade w.e.f. 1.4.1984 and that the current rules and other benefits applicable to the said grade would apply.

(c) By a further communication dated 16.4.1986 respondent No.1 informed the complainant that w.e.f. 1.4.1986 the complainant was being promoted to "O-1" grade and that the current rules and other benefits applicable to this grade would apply.

d) By a subsequent communication dated 1.4.1988 the management of respondent no.1 informed the

complainant that w.e.f. 1.4.1988 he was promoted to the "O-2" grade and that his designation would now be "Senior Accounts officer". It was also mentioned in this letter that the current rules and other benefits applicable to this grade would apply.

e) On 29.6.1990 the salary of the complainant was revised to Rs.3850/- and on 1.1.1992 he was further informed by the company that w.e.f. the date of the communication his designation was changed to "Manager Sales Tax and Fixed Assets".

f) In 1992 respondent no.1 company announced a scheme known as "FGP Limited Voluntary Retirement Scheme 1992". The scheme was made applicable by the company w.e.f. 1.10.1992 and was to remain in force till 30.6.1993. The scheme was applicable to all permanent employees of the company (excluding directors) who had put in more than 10 years of service of the company or who had completed the age of 40 years on the date of the submission of an application under the scheme. Certain VRS benefits were declared under that scheme to which an employee whose application was accepted, would be entitled. clause-6 of the aforesaid scheme was to the following effect :-

" The company reserves the right to accept

> or reject any application received under the scheme without assigning any reason whatsoever. The company's decision will be final and binding on all concerned."

(g) It is an admitted position that by his application dated 29.3.1993, the complainant applied for voluntary retirement under the VRS. His application was admittedly received on 30.3.1993.

(h) It is also not in dispute that on the original application one Mr.Zubin Dubhashi who was the finance manager made an endorsement to the following effect :-

> No VSP/VRS for finance department employees until upto the audit 31st May."

(i) That according to the complainant on 6.9.1993 one Mr.Khot who was his immediate superior made the following endorsement on his copy of his application dated 29.3.1993 "Agreed for release. But with reference to the notice from sales received today, I would request you to deal and sort out the problem in view of your rapport with the department and then may go under VRS by this month end". It was the

complainant's case that though this endorsement was made by his immediate superior Mr.Khot, after making this endorsement Mr.Khot took the signature of Mr.R.Srinivasan who was the Technical Manager in the company, thereunder.

(j) That on 1.10.1993 the complainant stopped attending his office and admittedly joined the services in another company.

(k) On 23.1.1994 the complainant addressed a letter to one Mr.H.S.Talathi, in the capacity of a trustee (PF) of the company, stating therein that he had resigned under the voluntary supression plan w.e.f. 1.10.1993 and that he would be grateful if his PF dues were cleared at the earliest.

(l) On 4.2.1994, respondent no.1-company paid to the complainant an amount of Rs.1,43,828.88/- as full and final settlement of all PF dues. This cheque was encashed and this amount has thus admittedly been received. On 12.7.1994 the petitioner addressed a letter to Mr.H.S.Talathi in the capacity of Vice President (Personnel) of the company, stating therein that he has accepted the offer of voluntary retirement and had been released on 30.9.1993. That it was unfortunate that even though a year has lapsed and inspite of several reminders

the management had failed to settle his voluntary retirement dues. The letter requested that dues of the complainant under VRS should be made available without further delay. A copy of this letter was sent to other officers of the company by name Mr.Ramchandran, Mr.Mahendra and Mr.Khot.

(m) On 22.8.1994 Mr.H.S.Talathi addressed a letter to one Mr.V.S.Menon who was an officer of the Respondent no.1 company in Hyderabad, stating therein that the complainant had been verbally informed in a meeting of the accounts department that he would be released as per the VRS after the audit work was over. Mr.Tripathi recommended that the complainant and one other employee by name S.V.Lobo should be relieved under the voluntary seperation plan.

(n) On 25.8.1994 respondent no.1 company addressed a letter to the complainant by way of the company's response to the complainant's letter dated 12.7.1994. It was stated in this letter that the complainant was aware that VRS was not offered to him nor was he assured by the company of any benefits thereunder. That it appeared that the complainant was not interested in employment with respondent no.1 company and therefore, his services were terminated with immediate effect for having

voluntary abandoned service. Enclosed alongwith this letter was a cheque for an amount of Rs.16,131/-, being 3 months notice pay. Complainant was advised to collect his other dues from the accounts department of the company during the working hours.

(o) Inspite of this clear letter the complainant sent letters dated 22.9.1994 and 30.10.1994 seeking the payment of his VSP dues. He also sent an Advocate's notice dated 26.3.1996 to respondent no.1-company placing on record his case and seeking the dues under the VRS scheme with 24% interest and other damages for mental agony. One more notice dated 15.4.1996 was sent by the complainant to the Advocate of respondent no.1 company again demanding the dues arising out of VRS alongwith interest @ 24% and sum of Rs.1 Lac for mental agony.

(p) Ultimately on 24.5.1996 the complainant filed a complaint being (ULP No.245/96) in the Industrial court at Thane, complaining of unfair labour practices covered under items-9 & 10 of Schedule-IV of the MRTU & PULP Act 1971. The substantial reliefs sought in the said complaint were as follows :-

(i) that this Hon'ble court be pleased to

declare that respondents have engaged in unfair labour practises under items-9 & 10 of Schedule-IV of the MRTU & PULP Act 1971 ;

(ii) that this Hon'ble court be pleased to direct the respondents to seize and desist from indulging in unfair labour practices under items-9 & 10 of Schedule-IV of the Act;

(iii) Respondents be directed to pay to the complainant and/or deposit in the court the entire amount i.e. Rs.1,81,588/- alongwith interest thereon @ 24% p.a. from 1.4.1993 till the date of passing of such order;

OR

(iv) Respondents be directed to deposit in the court the entire salary of the complainant from 25.8.1994 till today and continue to deposit the month to month salary till the matter is decided on merits.

. It may be pertinent to note that in his complaint or even otherwise by any other application permissible by law , the complainant did not

challenge the letter of termination dated 25.8.1994.

(q) The complainant also filed an application in the said complaint for condonation of delay. He stated in this application that the delay ought to be condoned because he had written 3 letters dated 12.7.1994, 22.9.1994 and 15.4.1996 to the company and had also sent legal notices dated 29.6.1996 and 23.6.1996. He further stated that the unfair labour practice complained of continuous in nature and therefore, it was in the interest of natural justice, equity and fair play that the application for condonation of delay may be granted. The industrial court fixed the hearing of this application alongwith the hearing of the main complaint.

(r) At the trial before the Industrial court, Thane, the complainant examined himself as (CW 1), Mr.H.S.Talathi who was the Vice president (Personnel) in the company till 1992 and a Consultant in the company till March-1994 as (CW 2) and Mr.Valerian Morzello who was a senior officer in the accounts department of respondent no.1 company and an ex-president of the staff association of the company from 1991 to 1994 as (CW 3). The company did not lead any evidence but in the course of the cross-examination of the complainant’s witnesses

introduced several documents into the evidence.

(s) On behalf of the respondents a written statement dated 28.9.1986 was filed. Therein the respondents contended that the complaint was untenable because it was barred by limitation, because the complainant was not a workman within the meaning of Section 3(5) of the MRTU & PULP Act 1971 and that no unfair labour practices covered under items-9 & 10 of Schedule-IV of the MRTU & PULP Act had been committed by the company.

(t) Ultimately, by an order dated 26.8.1997 a Member, Industrial court, Thane dismissed the complainant's complaint on four grounds which were as follows :-

(a) that the complaint was filed beyond the period of limitation and there was no ground to condone the delay ;

(b) that the complaint was not tenable as the complainant was from a managerial cadre and hence could not be said to be a workman within the meaning of section 3(5) of the MRTU & PULP Act 1971 ;

(c) that on the merits of the case, the complainant could not prove that respondent had committed any

breach of agreement ;

(d) that on the merits, the complainant could not prove that the respondents had indulged in any act of violence.

(u) Being aggrieved by the Judgment and order of the Industrial court dismissing his complaint, the complainant then filed a Writ petition purporting to be under section 226 and 227 of the Constitution of India before a single Judge of this court being Writ petition No.5800 of 1997. When the said Writ petition came up for admission on 21.4.1998, the same was summarily dismissed by a single Judge of this court. It was observed by the learned single Judge that he found no reason to interfere with the impugned order. That the learned Member of the Industrial court, Thane had rightly appreciated facts and come to the conclusion that the application alleged to have been submitted by the complainant for voluntary retirement scheme was a manipulated one. That the Industrial court had further rightly come to a conclusion after considering the work discharged by the petitioner that the complainant could not be called as a workman and was not entitled to get benefit of the scheme and lastly that the complainant had filed his complaint nearly 3 years after his retirement on

30.9.1993, thereby rendering the complaint barred by limitation, there being no ground to condone it.

(v) In these circumstances and against the last order passed by the learned single Judge, the present Letters Patent Appeal came to be filed.

3. On the merits of the case, we find that under the VRS of 1992 respondent no.1-company had reserved their right to accept or reject any application received under the scheme without assigning any reason what-so-ever and had expressly stipulated that the company's decision in this regard would be final and binding on all concerned. The witness no.2 examined on behalf of the complainant has categorically admitted in his cross-examination that as per the scheme, the Managing Director or the President of the company were the final authorities to accept or reject the VRS of any employee. This witness who was in fact the complainant's witness was a Consultant of the company till March-1994. He claimed to be a person who was directly involved in the framing of the scheme. In the present case there is absolutely nothing on record to show that the application for VRS made by the complainant had been accepted either by the Managing director or the President of respondent no.1-company. A glance at the written statement filed on behalf of the

respondent would indicate that it was the company's stand that the application for VRS preferred by the complainant did reach the hands of Mr.Joshi who was the Manager, Finance. It was averred that Mr.Joshi informed the respondent-company that the complainant could not be relieved and the application made could not be accepted. That Mr.Joshi, Senior Manager finance, who was then the immediate superior of the complainant also informed the complainant that his application would not be considered. It is true that the company could have led its own evidence to substantiate its aforesaid case. In fact it was urged on behalf of the complainant that this fact coupled with the fact that the original application had not been produced by the respondent in the court on the ground that the same was lost, must lead the court to draw an adverse inference that there was some endorsement on the original application to the effect that the same had been accepted. Our attention was drawn to other documents produced in evidence which were in the nature of applications made by other employees on which the endorsement of approval was made on the face of the document itself. It was contended that some such similar endorsement must be presumed to have existed on the face of the original application made by the complainant and that the respondents had deliberately supressed this document. Normally

speaking, we would have drawn an adverse inference but there are several additional circumstances in this case which prevent us from drawing such an adverse inference. These circumstances are as follows :-

(1) The complainant has produced in evidence a letter dated 22.8.1994 addressed by Mr.H.S.Talathi to a officer of respondent no.1-company in Hyderabad in which Mr.Talathi has recommended that the complainant be relieved under the voluntary separation plan. The fact that Mr.Talathi recommended that the complainant should be relieved under the VSP indicates that on the date of the letter i.e. 22.4.1994 Mr.Talathi was under an impression that the complainant's application had not been accepted as on the date when he wrote the said letter. Mr.Talathi was examined by the complainant as his witness. In his evidence Mr.Talathi states that he retired as Vice President (Personnel) in 1992 and that he was directly involved in the framing of the VRS scheme. He states that after retirement he continued as a Consultant with respondent no.1 company till March-1994. He does not categorically state in his evidence that any action was taken on his recommendation to relieve the complainant under the VRS though he was informed that after his

recommendation vide his letter dated 22.8.1994, another employee whom he had recommended for being relieved i.e. Mr.Lobo was infact released under the VRS scheme.

(2) The complainant's witness Mr.Talathi has further stated in his cross-examination that the managing director or the President of the respondent-company were the final authorities to accept or reject the VRS of the company. It could have been possible to summon these 2 persons as witnesses in the case but this was not done.

(3) The complainant himself has produced what appears to be a zerox of the office copy of his application dated 29.3.1993. This is clearly a copy of the original application because it contains the endorsement of Mr.Zubin Dubhash. It must be remembered that the case of the respondents was that this original document could not be found on the file. It would have been open for the complainant to explain either in the complaint and in the evidence as to how he obtained a zerox copy of the original application which according to the respondents was missing. There is however, no such explanation. The filing of the copy of the original can only indicate that either the complainant or

somebody sympathatic to him must have had access to the original at some stage. In this background, the Industrial court held that the complainant had involved himself in manipulation. We may not go so far as to state that the complainant has manipulated the record but we can certainly state that the complainant has not given a proper explanation as to how he came into custody of the zerox copy of the original application dated 29.3.1993 which according to the respondents was missing from his file.

4. Even if we assume that the respondents did not finally decide the complainant's application dated 29.3.1993 for grant of VRS for an unreasonably long period of time and till the scheme was closed, yet no benefit can accrue from this fact in favour of the complainant. Counsel appearing for the respondents drew our attention to the Judgment of the Apex court in the case of **Himachal Pradesh Horticultural Produce Marketing and Processing Corporation Ltd., V/s. Suman Behari Sharma** reported in 1996(2) L.L.N.501, in which the Apex court has observed as under :-

> "Under clause (2) of Bye-laws 3.8 of the Himachal Pradesh Horticultural Produce Marketing and Processing Corporation, Ltd., Employees service Bye-laws, the

employee has a right to make a request and his request would become effective only if he is "permitted" to retire. The words "may be permitted at his request" occurring in Clause(2) of Bye-law 3.8 clearly indicate that the said clause does not confer on the employee a right to retire on competition of either 25 years' service or on attaining the age of 50 years. It confers on the employee a right to make a request to permit him to retire. Obviously, if request is not accepted and permission is not granted the employee will not be able to retire as desired by him. Paragraph 5 of the bye-law is in the nature of an exception to para 2 and permits the employee who has not completed 25 years' service or attained 50 years of age to seek retirement if he has completed 20 years' satisfactory service. He can do so by giving three months' notice in writing. But the contention of the respondent-employee that under Para.5 the employee has a right to retire after giving three months' notice and no acceptance of such a request is necessary, is not correct. The bye-law has to be read as a whole. Paragraph 2 thereof

confers a right on the employee to request for voluntary retirement on completion of 25 years' service or on attaining the age of 50 years, but his desire would materialise only if he is permitted to retire and not otherwise. Ordinarily, in a matter like this an employee who has put in less number of years of service would not be on a better footing than the employee who has put in longer service. It would not have been the intention of the rule-making authority while framing Para.5 of the bye-law to confer on such an employee a better and a larger right to retire after giving three months' notice in writing. the word "seek retirement" in para.5 indicate that the right which is conferred by them is not the right to retire but a right to ask for retirement. The word "seek" implies a request by the employee and corresponding acceptance or permission by Himachal Pradesh Horticultural Produce Marketing and Processing Corporation, Ltd., Therefore, there cannot be automatic retirement or snapping of service relationship on expiry of three months' period.

" The Administrative Tribunal was wrong in holding that under Para.(5) of the bye-law the employee has a right to retire after giving three months' notice and that the respondent stood retired on expiry of three months' notice period as the respondent's request for retirement was not rejected within that period. It will be open to the appellant to proceed further with the proposed enquiry if it is otherwise expedient and permissible to do so."

" The High Court has not laid down a general proposition of law that when an employee seeks voluntary retirement the employer has to exercise his privilege of accepting or rejecting the request within a reasonable time and if a period is fixed for giving a notice in that behalf then the decision has to be taken within the period so fixed".

5. The Advocate for the complainant drew our attention to the Judgment of the Apex court given by a larger bench of 3 Judges in the case of **Tek Chand V/s.Dile Ram reported in AIR 2001 SUPREME COURT 905**.

In that case an Ex-Government servant who was contesting an election had submitted his application for voluntary retirement before the date of the filing of nomination. No communication had been made to him till the date of the election either refusing or accepting the voluntary retirement sought by him. The Apex court held that under Rule 48-A of the applicable service rules, the voluntary retirement is effective from the date of expiry of the period specified and therefore, the candidate could not be said to hold office till his application under the VRS was accepted. In our view, the aforesaid Judgment pertain to a person in Government service who was governed by statutory service rule being rule 48-A which was in the following terms :-

> 48-A " At any time after a Government servant has completed 20 years qualifying service, he may by giving notice of less than 3 months in writing to the appointing authority retire from service."

6. It is clear from the said statutory rule that there was no acceptance required by the statutory rule. The concept of VRS from Government service as contained in the aforesaid rule 48-A is completely different from the concept of VRS in the field of

labour law. Such schemes under the labour law are in the nature of a "golden handshake" which entail benefits other than usual superannuation benefits receivable on VRS from Government service. that in the scheme applicable to the complainant, there is a specific clause relating to acceptance. In our view, the authority cited on behalf of the complainant would not be applicable to the facts of the present case.

7. It was contended on behalf of the complainant that one of the senior officer of the company by name Mr.Srinivasan has given an endorsement on his copy of the application for VRS, accepting the application and directing his release by the end of the month. There is no material on record to show that Mr.Srinivasan who was a Technical manager had any authority to accept the complainant’s application. We have stated here-in-above that the complainant’s witness Mr.Talathi has categorically asserted in his evidence that the persons who could accept an application for VRS made by the employee were either the Managing director or the President of the company. It is also surprising that an endorsement was made on the copy of the applicant and not on the original application in the records of the company. We do not feel it necessary to dialate further on this aspect of the matter.

8. The Industrial court and the learned single Judge have also concluded that the complaint of the complainant was filed beyond the period of limitation prescribed under Section 28 of the MRTU & PULP Act 1971 and that there was no adequate ground for condonation of delay. In this regard, the Advocate for the complainant relied upon the Judgment of the Apex court in the case of **Collector, Land Acquisition, Anantnag and Anr. V/s. Mst.Katiji & ors.** reported in AIR 1987 SUPREME COURT 1353, in which the Apex court has observed as under :-

> "Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and the cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties."
>
> " Every day’s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour’s delay, every second’s delay ? The doctrine must be applied in a rational common sense pragmatic manner."

> " When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay."

9. In the present case, we are not condoning the delay but are required to consider a different issue as to whether the non condonation of delay by the Industrial court as found to have been correctly done by a single Judge of this court can be said to be perverse. In our view, the Industrial court has rightly held that the reason given for the late filing of the complaint viz.that the unfair labour practices committed were of a continuing and recurring nature, was not tenable, is correct. The benefits under VRS become grantable immediately on the acceptance of an application of the claimant. In the present case it can be seen that the respondent-company vide its letter dated 25.8.1994 had categorically informed the complainant that VRS had not been granted to him and that his services were teriminated on the footing that he had abandoned his service. The learned Advocate for the

complainant contended that thereafter he has written several letters but in our view, once the employee was categorically informed that VRS has not been granted to him, the mere writing of letters claiming dues could not be by itself a sufficient ground for condoning the gross delay in filing the complaint. We find that after this letter dated 25.8.1996 there is a delay of almost 1 year and 8 months as the complaint came to be filed on 24.5.1996. In our view, the reasons for non-condoning of the delay as contained in the impugned Judgment cannot be said to be perverse. Apart from this we have already concluded here-in-above that there is no merit in the applicant's contention relating to his application for VRS being accepted. This is another ground as to why ratio of the Apex court in the Judgment cited would not be applicable to the present case.

10. The Industrial court has further held that the complainant was not a workman within the meaning of Section 3(5) of the MRTU & PULP Act 1971. This finding has been confirmed in the impugned order passed by a single Judge of this court. It appears that the designation of the complainant at the time when he applied for VRS was Manager-Sales Tax/Fixed Assets. We are aware that a designation by itself would not be a definitive test to decide whether an

employee can be said to be a workman. The Industrial court however, has perused the evidence pertaining to the nature of the complainant's job while in service. A reference has been made to several promotions granted to the complainant. The Industrial court referred to several letters which were produced in the evidence in which the complainant had signed as a Manager. It is noted that the letter (Exh.C-18) indicated that the complainant was representing the company in sales tax matters and was writing letters to the Bank under his signature for part payment of sales tax. That the sales tax returns were being signed by the complainant in the capasity of Manager-Sales Tax and the complainant was also dealing with the different departments in relation to sales tax matters. The Industrial court concluded that these activities could not be said to be purely clerical in nature. In order to escape from the rigours of these letters, the complainant had deposed that he was writing such letters under the instructions of his superior Mr.Joshi. The Industrial court however, concluded that these letters indicated that he had signed as a Manager and the persons who had typed and dictated the letters were below his grade. The Industrial court concluded that the job being done by the complainant could not be said to be clerical in nature but indicated that the complainant was

working in a managerial capasity. The single Judge has concurred with the reasons given by the Industrial Court. In our view, there is no reason to hold that the conclusion based on these findings can be said to be perverse.

11. In the result, the Letters Patent Appeal must fail and is hereby dismissed. In view of the interim orders passed by this court in this appeal, it is directed that the amount of Rs.1,82,000/- shall not be withdrawn by the respondents for a period of 12 weeks from today.

. Parties to act on an ordinary copy of this order duly authenticated by the Personal Secretary of this court as a true copy.

(R.S.Mohite,J) **(S.B.Mhase,J)**